TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 436

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

vs.

JAMES V. REUTER, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 18, 1943
CERTIORARI GRANTED NOVEMBER 22, 1943

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

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L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

vs.

JAMES V. REUTER, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

1 In the District Court of the United States, Eastern District of Louisiana, New Orleans Division

No. 578 (Civil Action)

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

vs.

JAMES V. REUTER, INC., DEFENDANT

[Appearances omitted in printing.]

2 *Bill of complaint*

Filed January 23, 1942

I

Plaintiff brings this action to enjoin defendant from violating the provisions of Sections 15 (a) (1), 15 (a) (2), 15 (a) (3), and 15 (a) (5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201, et seq.), hereinafter called the Act.

II

Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

III

Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Louisiana, having its principal office, place of business and plant in the City of New Orleans, Orleans Parish, Louisiana, within the jurisdiction of this Court, and is, and

3 at all times hereinafter mentioned was, engaged at its said place of business in the said City of New Orleans in the purchasing, handling, transporting, storing, warehousing, and wholesale and distribution of fruits and vegetables in commerce among the several States.

IV

At all times hereinafter mentioned, defendant employed and is employing approximately 10 employees in and about its said place of business in New Orleans, Louisiana, in the purchasing, handling, transporting, storing, warehousing, and wholesale sale and distribution of fruits and vegetables in commerce among the several States. Substantially all of the business conducted by

defendant at its said plant, and substantially all of the operations performed by said employees are concerned with goods handled, moved, transported, or shipped in interstate commerce and are an essential part of the stream of interstate commerce and said employees are engaged in interstate commerce within the meaning of the Fair Labor Standards Act. Substantial portion of the goods purchased, handled, transported, stored, warehoused, and sold and distributed at wholesale by the said employees of the said company have been, and are being sold, transported, shipped, and delivered in interstate commerce in the State of Louisiana, to, into, and through States other than the State of Louisiana.

V

During the period beginning October 24, 1938, the effective date of Section 6 (a) (1) of the Act, and repeatedly thereafter through October 23, 1939, defendant paid to many of its aforesaid employees wages at rates less than twenty-five cents (25¢) an hour for their employment in the purchase, handling, transportation, sale and distribution of goods in interstate commerce, as aforesaid; and, during the period beginning October 24, 1939, the effective date of Section 6 (a) (2) of the Act, and repeatedly thereafter, defendant has paid to many of its aforesaid employees wages at rates less than thirty cents (30¢) an hour for their employment in the purchasing, handling, transporting, sale and distribution of goods in interstate commerce, as aforesaid. By failing and refusing to pay its said employees wages at rates not less than the said rates during the said periods, defendant has violated and is violating the provisions of Sections 6 and 15 (a) (2) of the Act.

VI

During the period beginning October 24, 1938, the effective date of Section 7 (a) (1) of the Act, and repeatedly thereafter through October 23, 1939, defendant employed many of its aforesaid employees, who were engaged in the purchasing, handling, transporting, sale and distribution of goods in interstate commerce, as aforesaid, for workweeks longer than forty-four (44) hours, and did fail and refuse to compensate the said employees for their employment in excess of forty-four (44) hours in such workweek at rates not less than one and one-half times the regular rates at which they were employed, and, in fact, did fail and refuse to compensate them for such excess hours at any rates greater than the regular rates at which they were employed; and, during the period beginning October 24, 1939, the effective date of Section 7 (a) (2) of the Act, and repeatedly thereafter through October

23, 1940, defendant employed many of its aforesaid employees who were engaged in the purchasing, handling, transporting, sale and distribution of goods in interstate commerce, as aforesaid, for workweeks longer than forty-two (42) hours, and did fail and refuse to compensate the said employees for their employment in excess of forty-two (42) hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed; and, during the period beginning October 24, 1940, the effective date of Section 7 (a) (3) of the Act, and repeatedly thereafter, defendant has employed many of its aforesaid employees, who were engaged in the purchasing, handling, transporting, sale and distribution of goods in interstate commerce, as aforesaid, for workweeks longer than forty (40) hours, and has failed and refused to compensate the said employees for their employment in excess of forty (40) hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, and, in fact, has failed and refused to compensate them for such excess hours at any rates greater than the regular rates at which they were employed. By employing the said employees for workweeks in excess of the said hours during the said periods without compensating them for their employment in excess of the said hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, defendant has violated and is violating the provisions of Sections 7 and 15 (a) (2) of the Act.

VII

During the period beginning on or about October 24, 1938, and repeatedly thereafter, defendant has sold, shipped, delivered, transported, and offered for transportation in interstate commerce from points within the State of Louisiana to, into, and through other States than the State of Louisiana, goods stored and handled in its said place of business, in the handling and storing of which many of its employees were employed in violation of Sections 6 and 7 of the Act, as alleged in Paragraphs V and VI hereof. By selling, shipping, delivering, transporting, and offering for transportation in interstate commerce, as aforesaid, the said goods so handled, defendant has violated and is violating the provisions of Section 15 (a) (1) of the Act.

VIII

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11 (c) of the Act,

duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours, and other conditions and practices of employment to be made, kept, and preserved by every employer subject to any provision of the Act. The said regulations, and amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

IX

During the period beginning October 24, 1938, and repeatedly thereafter, defendant, an employer subject to the provisions of the Act and to the regulations referred to in Paragraph VIII hereof, has failed and refused to make, keep, and preserve, as prescribed by said regulations, adequate records of the persons employed by it and of the wages, hours, and other conditions and practices of employment maintained by it, in that the records made, kept, and preserved by the defendant fail to show adequately, among other things, the hours worked each workday and each workweek, the regular rate of pay and the basis upon which wages are paid; the wages at the regular rate of pay for each workweek (excluding extra compensation attributable to the excess of the overtime rate over the regular rate), and the extra wages for each workweek attributable to the excess of the overtime rate over the regular rate, with respect to many of its said employees. By failing and refusing to make, keep, and preserve adequate records as prescribed by the said regulations, defendant has violated and is violating the provisions of Section 11 (c) and 15 (a) (5) of the Act.

7

X

During the period beginning October 24, 1938, and repeatedly thereafter, defendant, an employer subject to the provisions of the Act and to the regulations referred to in Paragraph VIII hereof, has made and recorded or caused to be made and recorded in its records of persons employed by it and of the wages and hours of employment maintained by it, entries concerning hours worked by many of its employees, which entries are inaccurate and do not comply adequately with the requirements of the Act and of said regulations. By making and recording, or causing to be made and recorded in its said records, the said inaccurate and inadequate entries, defendant has violated and is violating the provisions of Sections 11 (c) and 15 (a) (5) of the Act.

XI

Since October 24, 1938, defendant has discharged and in other manner discriminated against certain of its employees because such employees filed complaints, instituted and caused to be instituted suits and other proceedings under or related to the Act and have testified or were about to testify in such suits or proceedings. By discharging or in other manner discriminating against such employees as aforesaid, defendant has violated and is violating Section 15 (a) (3) of the Act.

XII

Defendant has, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

8 Wherefore, cause having been shown, plaintiff demands judgment enjoining and restraining defendant, its officers, agents, servants, employees, and attorneys, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Section 15 (a) (1), 15 (a) (2), 15 (a) (3), and 15 (a) (5) of the Act, both permanently and during the pendency of this action, and such other and further relief as may be necessary and appropriate.

(Signed) WARNER W. GARDNER,
Warner W. Gardner,
Solicitor,

(Signed) IRVING J. LEVY,
Irving J. Levy,
Assistant Solicitor,
In Charge of Litigation.

(Signed) JEROME A. COOPER,
Jerome A. Cooper,
Regional Attorney,

(Signed) RICHARD C. KEENAN,
Richard C. Kennan,
Associate Attorney, United States Department of Labor,
Attorneys for Plaintiff.

Post Office Address: % Wage and Hour Division, U. S. Department of Labor, 916 Union Building, New Orleans, Louisiana, or % Wage and Hour Div., U. S. Department of Labor, Washington, D. C.

9 In United States District Court

Motion to dismiss claim, or in the alternative for a bill of particulars

Filed February 16, 1942

The defendant moves the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

2. In the alternative and only if the Court should determine that the complaint states a claim against the defendant upon which relief can be granted, then for a bill of particulars and more definite statement of the violations of the Fair Labor Standards Act alleged to have been committed by the defendant. That the allegations of the complaint are so vague, general, indefinite and unrevealing as to make it impossible for defendant to prepare his responsive pleading or his trial. That to remedy these deficiencies in averments, and to particularize instances of alleged violations, enabling the defendant to properly prepare responsive pleadings and for trial, the Court should order the plaintiff to make his complaint more definite in the following particulars, to-wit:

1. To furnish the names of the employees who were paid less than twenty-five cents and thirty cents per hour from and after October 24, 1939, and October 24, 1939, respectively, as alleged in paragraph V of the complaint.

2. To specify the particular workweeks plaintiff claims the respective employees referred to in paragraph V of said complaint were paid wages at rates less than the minimum prescribed by the Fair Labor Standards Act of 1938.

10 3. To furnish the names of employees who were not compensated at the overtime rates for hours worked in excess of the maximum hours prescribed by the Fair Labor Standards Act of 1938, as claimed in paragraph VI of said complaint.

4. To allege the particular workweeks that plaintiff claims the employees referred to in paragraph VI were employed in excess of the maximum hours prescribed by the act without payment of overtime compensation.

5. To specify to whom and on what dates the shipments, deliveries and sales referred to in paragraph VII of the complaint were made.

6. To furnish the names of the employees engaged in the handling and storing of the goods referred to in paragraph VII of the complaint.

7. To furnish the names of the employees and the particular workweek of each such employee as to which plaintiff claims that

the record kept by the defendant failed to show the hours worked each workday and each workweek, the regular rate of pay and the basis upon which wages are paid, the wages at the regular rate of pay for each workweek, and the extra wages for each workweek attributable to the excess of the overtime rate over the regular rate, all as set forth in paragraph IX of said complaint.

8. To specify in detail how the records kept by the defendant were not adequate and in conformity with the regulations prescribed, and to specify in detail the conditions and practices of employment referred to in paragraph IX of the complaint.

9. To furnish the names of the employees involved and in what respects the entries on defendant's records are inaccurate
11 and failed to comply with the requirements of said Act and that of the regulations promulgated thereunder, as alleged in paragraph X of the complaint.

10. To furnish the names of the employees alleged to have been discriminated against, and to specify in what manner and on what dates the alleged discrimination set forth in paragraph XI of the complaint occurred.

NORMANN & ROUCHELL and
JAMES E. BROWN,
Attorneys for Defendant,

By (Sgd.) F. NORMANN,
Trial Attorney.

1605 Hibernia Bldg., New Orleans, Louisiana.

Notice of motion

To RICHARD C. KEENAN, Esq.,
Attorney for Plaintiff,
U. S. Department of Labor,
916 Union Building, New Orleans, La.

Please take notice that the undersigned will bring the above motion on for hearing before this Court at United States Post Office Building, City of New Orleans, on the 25th day of February, 1942, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

(Sgd.) F. NORMANN,
Attorneys for Defendant.

12 In United States District Court

Order overruling motion to dismiss and granting motion for bill of particulars

February 25, 1942

BORAH, J.:

This cause came on this day for hearing on motion of defendant to dismiss claim, or, in the alternative, for a Bill of Particulars.

Whereupon, after hearing argument of counsel for the respective parties, and on consideration thereof,

It is Ordered by the Court that the motion to dismiss be, and it hereby is, overruled, and it is further Ordered that the motion for a Bill of Particulars be, and it hereby is, granted, plaintiff to furnish said Bill of Particulars within ten days from date.

13 In United States District Court

Bill of particulars

Filed March 6th, 1942

Now comes plaintiff, and in response to the Court's order, dated February 25, 1942, furnishes defendant with the particulars requested by it.

1. The following employees of defendant were paid less than twenty-five cents (25¢) per hour from October 24, 1938, to October 24, 1939: Henry Murray, Chester Moss, August Johnson, Victor Norman, Frank Pillitteri, Frank Hood and other employees of defendant who may be found to have been employed at rates less than twenty-five cents (25¢) per hour during the above-mentioned period.

The following employees of defendant were paid less than thirty cents (30¢) per hour subsequent to October 24, 1939: Henry Murray, Chester Moss, August Johnson, Victor Norman, Frank Pillitteri, Frank Hood, Ralph Blond, Arthur Joseph

14 Morgan, Joseph Parker, Gabe Searcy, and other employees of defendant who may be found to have been employed at rates less than thirty cents (30¢) per hour during the period subsequent to October 24, 1939.

2. Henry Murray was employed at sum-minimum rates during all workweeks from October 24, 1938, through July 20, 1940, except the workweeks ending February 25, 1939, May 20, 1939, May 27, 1939; June 3, 1939, June 10, 1939, July 8, 1939, July 22, 1939, August 26, 1939, and March 30, 1940, and other workweeks

which this employee may be found to have been employed at subminimum rates by defendant.

Chester Moss was employed at subminimum rates during all workweeks from October 24, 1938, through October 5, 1940, and any other workweeks during which this employee may be found to have been employed by defendant at subminimum rates.

August Johnson was employed at subminimum rates during all workweeks from October 24, 1938, through August 24, 1940, except the workweeks ending November 11, 1939, January 6, 1940, February 17, 1940, and February 24, 1940, and any other workweeks which this employee may be found to have been employed at subminimum rates by defendant.

Victor Norman was employed at subminimum rates during all workweeks from October 24, 1938, through October 5, 1940, except the workweeks ending November 11, 1939, January 6, 1940, February 10, 1940, February 17, 1940, February 24, 1940, March 2, 1940, March 9, 1940, and March 16, 1940, and any other workweeks during which this employee may be found to have been employed by defendant at subminimum rates.

15 Frank Pillitteri was employed at subminimum rates during all workweeks from October 24, 1938, through September 30, 1939, except the workweek ending January 14, 1939, and any other workweeks which this employee may be found to have been employed by defendant at subminimum rates.

Frank Hood was employed at subminimum rates during all workweeks from on or about April 1, 1940, through on or about December 31, 1940, and any other workweeks during which this employee may be found to have been employed by defendant at subminimum rates.

Ralph Blond was employed at subminimum rates during all workweeks subsequent to January 1, 1940, and any other workweeks which this employee may be found to have been employed by defendant at subminimum rates.

Arthur Joseph Morgan was employed at subminimum rates during all workweeks subsequent to on or about November 1, 1940, except the workweeks ending March 21, 1941, April 4, 1941, May 23, 1941, and June 27, 1941, and any other workweeks which this employee may be found to have been employed by defendant at subminimum rates.

Joseph Parker was employed at subminimum rates during all workweeks subsequent to on or about August 30, 1941, to date, and any other workweeks which this employee may be found to have been employed by defendant at subminimum rates.

Gabe Searcy was employed at subminimum rates during all workweeks subsequent to on or about January 1, 1941, and any

other workweeks which this employee may be found to have been employed by defendant at subminimum rates.

16 3. The following employees were not properly compensated by defendant for overtime hours worked in excess of the maximum hours prescribed by the Fair Labor Standards Act of 1938, as alleged in paragraph VI of the complaint: Henry Murray, Chester Moss, August Johnson, Victor Norman, Frank Pillitteri, Frank Hood, Ralph Blond, Arthur Joseph Morgan, Joseph Parker, Gabe Searcy.

4. Henry Murray was not properly compensated by defendant for overtime hours worked in excess of the statutory maximum during all workweeks between October 24, 1938, and July 20, 1940, except the workweek ending August 26, 1939, and all workweeks during which this employee may be found to have been employed in excess of the statutory minimum without extra compensation for overtime.

Chester Moss was not compensated by defendant for overtime hours worked in excess of the statutory maximum during all workweeks between October 24, 1938, and October 12, 1940, and all workweeks during which this employee may be found to have been employed in excess of the statutory minimum without extra compensation for overtime.

17 August Johnson was not compensated by defendant for overtime hours worked in excess of the statutory maximum during all workweeks between October 24, 1938, and August 24, 1940, except the workweeks ending February 17, 1940, and February 24, 1940, and all workweeks during which this employee may be found to have been employed in excess of the statutory minimum without extra compensation for overtime.

Victor Norman was not compensated by defendant for overtime hours worked on excess of the statutory maximum during all workweeks between October 24, 1938, and October 5, 1940, except the workweeks ending February 3, through February 16, 1940, inclusively, and all workweeks during which this employee may be found to have been employed in excess of the statutory minimum without extra compensation for overtime.

Frank Pillitteri was not compensated by defendant for overtime hours worked in excess of the statutory maximum during all workweeks between October 24, 1938, and September 30, 1939, except the workweek ending January 14, 1939, and all workweeks during which this employee may be found to have been employed in excess of the statutory minimum without extra compensation for overtime.

Frank Hood was not compensated by defendant for *over*-overtime hours worked in excess of the statutory maximum during all workweeks between on or about April 1, 1940, through on

or about December 31, 1940, and all workweeks during which this employee may be found to have been employed in excess of the statutory minimum without extra compensation for overtime.

Ralph Blond was not compensated by defendant for overtime hours worked in excess of the statutory maximum during
18 all workweeks subsequent to January 1, 1940, and all workweeks during which this employee may be found to have been employed in excess of the statutory minimum without extra compensation for overtime.

Arthur Joseph Morgan was not compensated by defendant for overtime hours worked in excess of the statutory maximum during all workweeks subsequent to on or about November 1, 1940, except the workweeks ending March 21, 1941, and April 4, 1941, and all workweeks during which this employee may be found to have been employed in excess of the statutory minimum without extra compensation for overtime.

Joseph Parker was not compensated by defendant for overtime hours worked in excess of the statutory maximum during all workweeks subsequent to on or about August 30, 1941, to date, and all workweeks during which this employee may be found to have been employed in excess of the statutory minimum without extra compensation for overtime.

Gabe Searcy was not compensated by defendant for overtime hours worked in excess of the statutory maximum during all workweeks subsequent to on or about January 1, 1941, and any other workweeks during which this employee may be found to have been employed in excess of the statutory minimum without extra compensation for overtime.

5. Shipments, sales, and deliveries referred to in paragraph VII of the complaint were made by defendant to the following firms, corporations, and individuals on the following dates:

19

Douglas Brothers, Birmingham, Ala	5- 4-41
Catanzano Brothers, Birmingham, Ala	6- 3-41
Catanzano Brothers, Birmingham, Ala	6-14-41
Catanzaro Brothers, Birmingham, Ala	6-14-41
Jack Hurley Produce Co., Birmingham, Ala	6-18-41
Catanzaro Brothers, Birmingham, Ala	6-14-41
Jack Hurley Produce Co., Birmingham, Ala	6-24-41
Jitney Jungle No. 6, Jackson, Miss	1- 2-42
Community Stores, Jackson, Miss	1- 2-42
Jitney Jungle No. 12, Jackson, Miss	1- 2-42
Jitney Jungle No. 4, Jackson, Miss	1- 2-42
Jitney Jungle, Jackson, Miss	11- 6-41
Jitney Jungle No. 6, Jackson, Miss	11- 6-41
Jitney Jungle No. 14, Jackson, Miss	10-31-41

	Green & Milam, Atlanta, Ga	5- 7-41
	B. N. Griggs, Montgomery, Ala	6-11-41
	Green & Milam, Atlanta, Ga	6-11-41
	Variety Seafood Co., Montgomery, Ala	6-11-41
	King's Self Service, Columbus, Ga	6-11-41
	Michael Brothers, Rosedale, Miss	6-17-41
	C. Engels Sons, Washington, D. C	6-19-41
	Piggly Wiggly, Rosedale, Miss	6-19-41
	Stedman Co., Beaumont, Tex	6-21-41
	Stedman Co., Lake Charles, La	6-21-41
	Crenshaw Bros. Produce Co., Tampa, Fla	6-21-41
	M. P. Wilcox, Montgomery, Ala	6-21-41
	Pickwick Cafe, Montgomery, Ala	12- 9-41
	Fitch Wilkinson, Inc., Jacksonville, Fla	6-27-41
	W. M. Ware, Jackson, Miss	7- 3-41
	McCullough Bros., Atlanta, Ga	7- 9-41
	Crenshaw Bros. Prod. Co., Tampa, Fla	7- 9-41
	Gilsters Wholesale Grocery, Selma, Ala	7- 9-41
	Michael Bros., Rosedale, Miss	7-15-41
	Pickwick Cafe, Montgomery, Ala	12- 9-41
	Warby Fruit & Produce Co., Mobile, Ala	1- 2-42
	Piggly Wiggly, Rosedale, Miss	12-30-41
	The Perry Store, Meridian, Miss	12-23-41
	Atlantic Comm. Co., Houston, Tex	12-23-41
20	Pickwich Cafe, Montgomery, Ala	12-16-41
	Morske Prod. Co., St. Louis, Mo	12-16-41
	Atlanta Comm. Co., Houston, Tex	12- 9-41
	Variety Seafood Co., Montgomery, Ala	12- 9-41
	Pickwick Cafe, Montgomery, Ala	12- 9-41
	S. V. Cefalu, Atlanta, Ga	12- 9-41
	Heidelburg Hotel, Jackson, Miss	12- 1-41
	Geo. A. Ryder Co., Galveston, Tex	12- 1-41
	Barry Comm. Co., St. Louis, Mo	11-17-41
	Mayflower Cafe, Jackson, Miss	11-17-41
	Barry Comm. Co., St. Louis, Mo	11-17-41
	Atlantic Comm. Co., Houston, Tex	11-17-41
	Variety Seafood Co., Montgomery, Ala	11-10-41
	Jake Werfel, Montgomery, Ala	11- 5-41
	Variety Seafood Co., Montgomery, Ala	10-23-41
	Gilster Wholesale Grocery, Selma, Ala	10-16-41
	Adler's Food Store, San Antonio, Tex	10-16-41
	Jack Hurley Prod. Co., Birmingham, Ala	10- 6-41

Petitioner shows that since October 24, 1938, daily shipments have been made and are being made to the above-mentioned concerns or other concerns located without the State of Louisiana.

6. The following employees were engaged in the handling and storing of goods referred to in paragraph VII of the Complaint: Henry Murray, Chester Moss, August Johnson, Victor Norman, Frank Pillitteri, Frank Hood, Ralph Blond, Arthur Joseph
21 Morgan, Joseph Parker, Gabe Searcy, and any other employees who may be found to have been employed by defendant in the handling and storing of goods.

7. The records maintained by defendant failed to show the hours worked each workday and each workweek, the regular rate of pay and basis upon which wages are paid, the wages at the regular rate of pay for each workweek, and the extra wages for each workweek attributable to the excess of the overtime rate over the regular rate as to the following named employees: Henry Murray, Chester Moss, August Johnson, Victor Norman, Frank Pillitteri, Frank Hood, Ralph Blond, Arthur Joseph Morgan, Joseph Parker, Gabe Searcy.

8 and 9. Records kept as to each of the employees named in the preceding paragraph and as to other employees of defendant are inaccurate and inadequate in that prior to on or about September 1940, no record was maintained of hours worked by the day or by the week, and that since that date the records are inadequate and inaccurate in that they do not correctly record the actual number of minimum and overtime hours worked each day and each workweek, nor correctly record the minimum and overtime rates of pay, nor accurately record the wages paid at the regular rate,
22 nor accurately record the extra wages for each workweek attributable to the excess of the overtime rate over the regular rate, nor accurately record the total wages paid; that such violations have been continuous from October 24, 1938, to date.

10. Henry Murray and August Johnson were discharged by defendant during the course of an investigation by the Wage and Hour Division, United States Department of Labor, for the reason that they refused to sign a statement prepared by defendant concerning their employment with defendant, which statement was an untrue statement of the facts concerning said employment, and because they insisted upon their right to unpaid compensation due under the Fair Labor Standards Act, and for the further reason that they had testified before a representative of the Wage and Hour Division, and during the course of this proceeding had complained of violations of the Fair Labor Standards Act by their employer as to their employment with defendant.

Chester Moss was fired for making a demand through an attorney upon defendant for the unpaid compensation due him under the Fair Labor Standards Act.

Henry Murray and August Johnson were discharged on *on* or about August 28, 1940, and Chester Morris was *dis-* discharged on or about October 8, 1940, and the discriminatory actions for which these employees were fired occurred just prior to their discharge.

(Signed) WARNER W. GARDNER,
Solicitor.

(Signed) ROY C. FRANK,
Assistant Solicitor.

23 (Signed) JEROME A. COOPER,
Regional Attorney.

(Signed) RICHARD C. KEENAN.
Associate Attorney.

Post Office Address: c/o Wage and Hour Division, U. S. Department of Labor, 916 Union Building, New Orleans, Louisiana, or c/o Wage and Hour Division, U. S. Department of Labor, Washington, D. C.

Served by mailing a copy to Normann & Rouchell, Attorneys at Law, Hibernia Bank Building, New Orleans, Louisiana, on March 6, 1942.

(Signed) RICHARD C. KEENAN.

In United States District Court

Motion to strike parts of complaint, etc.

Filed March 14th, 1942

The defendant moves the Court as follows:

To strike from amongst the allegations in plaintiff's complaint, as supplemented by the bill of particulars, all allegations of violations of the Fair Labor Standards Act alleged to have occurred prior to January 23, 1941, which date is one year prior to the filing of this complaint, and in particular to strike the hereinafter particularized allegations in plaintiff's complaint.

24 That the hereinafter particularized allegations and all other allegations pertaining to alleged violations of the Fair Labor Standards Act prior to January 23, 1941, or occurring more than one year before this complaint was filed are immaterial and impertinent, and have no possible bearing upon the subject matter of this litigation, which is the issuance of an injunction to restrain alleged existing violations of said Act.

That the presence in plaintiff's complaint of the allegations referred to above, are prejudical to the interests of the defendant, and only tend to cloud the real issue before the Court at this time.

That the particular allegations in plaintiff's complaint and bill of particulars which should be stricken as immaterial to the issue and prejudicial to the defendant are as follows:

1. The allegations in paragraph 1 of plaintiff's bill of particulars.

2. The allegations of paragraph 2 of plaintiff's bill of particulars except insofar as they refer to employees Ralph Blond, Arthur Joseph Morgan, Joseph Parker, and Gabe Searcy concerning alleged violations subsequent to January 23, 1941.

3. The allegations of paragraphs 3 and 4 of plaintiff's bill of particulars, except insofar as they refer to employees Ralph Blond, Arthur Joseph Morgan, Joseph Parker, and Gabe Searcy concerning alleged violations of the Fair Labor Standards Act subsequent to January 23, 1941.

4. The allegations of paragraph 6 of the plaintiff's bill of particulars except insofar as they refer to the work performed by employees Frank Hood, Ralph Blond, Arthur Joseph Morgan, Joseph Parker, and Gabe Searcy, subsequent to January 23, 1941.

5. The allegations of paragraph 7 of the plaintiff's bill of particulars except insofar as they refer to records covering work performed subsequent to January 23, 1941.

6. The allegations of paragraphs 8 and 8 of plaintiff's bill of particulars except insofar as they refer to alleged violations subsequent to January 23, 1941.

7. All of the allegations of paragraph 10 of plaintiff's bill of particulars, as referring to incidents prior to January 23, 1941.

8. The allegations of paragraphs V, VI, and VII of the original complaint except insofar as they refer to alleged violations subsequent to January 23, 1941.

9. The allegations of paragraphs IX, X, and XI of the original complaint except insofar as they might refer to alleged violations occurring subsequent to January 23, 1941.

Defendant further moves the Court that it be given additional time to file an answer in this matter after the motion to strike is heard and disposed of, and that an adjudication upon the merits of this claim be deferred until such time has elapsed, in accordance with the requirements of Rule 12 (a) of the Federal Rules of Civil Procedure.

NORMANN & ROUCHELL and
JAMES E. BROWN,
Attorneys for Defendant,

By (Sgd.) F. NORMANN,
Trial Attorney.

1605 Hibernia Bldg., New Orleans, Louisiana.

26 *Notice of motion*

To Mr. Richard C. Keenan, Esq.,
Attorney for Plaintiff,
U. S. Department of Labor,
916 Union Building, New Orleans, Louisiana.

Please take notice that the undersigned will bring the above motion on for hearing before this Court, United States Post Office Building, City of New Orleans, on Wednesday, the 25th day of March, 1942, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Normann & Rouchell and
James E. Brown,
By (Sgd.) F. Normann,
Attorneys for Defendant.

In United States District Court

Order overruling motion to strike

March 25, 1942

Borah, J.:

This cause came on this day to be heard on defendant's motion to strike certain allegations of plaintiff's complaint and of plaintiff's bill of particulars.

27 Whereupon, after hearing argument of counsel for respective parties and on consideration thereof,

It is ordered, that the motion to strike be and hereby is denied.

In United States District Court

Order for substitution of party plaintiff

Filed March 25th, 1942

The parties hereto having stipulated that L. Metcalfe Walling, Administrator of the Wage and Hour Division of the United States Department of Labor, be substituted as party plaintiff herein in the place and stead of Thomas W. Holland, it is

Ordered that L. Metcalfe Walling, as Administrator of the Wage and Hour Division of the United States Department of Labor, be and hereby is substituted as plaintiff herein in the place and stead of Thomas W. Holland without prejudice to the proceedings already had in this action and that this cause may be

continued and maintained by said L. Metcalfe Walling as successor in office of said Thomas W. Holland.

Dated March 25, 1942.

(Signed) WAYNE G. BORAH,
District Judge.

28 In United States District Court

Answer

Filed March 31, 1942

Now comes defendant, and with full reservation of its plea of prescription hereinafter urged to any and all alleged violations occurring or admitted to have existed for more than one (1) year prior to the filing of this suit, for the purpose of responding to plaintiff's complaint, as supplemented by the bill of particulars, respectfully represents:

1. Your respondent denies each and every allegation of the complaint, as supplemented by the bill of particulars, save and except those allegations pertaining to the Court's jurisdiction; respondent's corporate existence; the names and number of respondent's present and ex-employees; merchandise shipments, and such other facts as may be hereafter admitted, subject to the prescriptive plea made herein.

2. Defendant further avers, for more than one year prior to the filing of this suit, it changed its method of keeping its records and conformed its practice, insofar as its covered employees are concerned, in accordance with certain suggestions and recommendations of the representatives of the Wage and Hour Division, to more fully comply with the regulations promulgated by the administrator of the Wage and Hour Division.

3. In the alternative defendant avers, any alleged violation of the statute or the regulations promulgated by the Wage
29 and Hour Administrator, and during the effective period thereof, which it may have committed, occurred more than one year prior to the institution of the present suit, was inadvertent and unintentional, and is subject to the plea of one year prescription, which defendant specially pleads in bar of any action thereon.

4. Further answering defendant avers, for more than one year prior to the filing of this suit, it has and is now conforming its records and practice to and in accordance with the regulations promulgated by the administrator of the Wage and Hour Division and in accordance with the Fair Labor Standards Act, insofar as its covered employees are concerned, and that it has

no intention not to comply with said Act in the future, and that it verily believes its practice fully conforms to the requirements of the statute.

Wherefore, defendant demands:

I. That there be judgment rendered in favor of defendant, James V. Reuter, Inc., and against plaintiff, L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor, rejecting plaintiff's demands, and dismissing this suit without costs to defendant.

II. For all such additional relief as law, equity, and the nature of the case may require or allow.

By F. NORMANN,
A Member of the Firm.
NORMANN & ROUCHELL,
Attorneys for Defendant.
Suite 1605 Hibernia Building, New Orleans, Louisiana.

30 In United States District Court

Findings of Fact

Filed March 31, 1943

BORAH, District Judge:

This is a suit brought by the Administrator to enjoin respondent from violating provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. Section 201. The material facts are these:

FINDINGS OF FACT

1. The defendant is, and at all times since October 24, 1938, the effective date of the minimum wage, overtime compensation, and record-keeping requirements established by the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U. S. C. Sec. 201, et seq.), hereinafter referred to as the Act, has been a corporation existing by virtue of the laws of the State of Louisiana, with its principal office and place of business at 817 Decatur Street, New Orleans, Louisiana, where it engages in purchasing, receiving, handling, selling, and distributing, at wholesale, fresh vegetables, fruits, and similar produce. Defendant employs from 10 to 15 employees, including office help, warehousemen, truck drivers, and laborers in carrying on its business.

2. Defendant purchases approximately 50% of the produce handled by it from out-of-State sources. These produce are
31 usually shipped to it by railroad, in carload and half-carload lots, and the refrigerated cars carrying the goods

are switched to a siding approximately one block from defendant's place of business, known as the "Reuter Switch." An average of twelve to twenty freight cars a month, carrying produce consigned to defendant, arrive at the "Reuter Switch" from points outside of the State of Louisiana.

3. All of the vegetables and produce arriving from out-of-State sources are unloaded from the freight cars and brought to defendant's place of business to be uncrated and examined before being sold. Defendant's employees, principally a carman and truckdrivers and occasionally warehousemen unload the produce from the freight cars and truck it to defendant's place of business. The carman spends the greater portion of his time engaged in the unloading operations. Truck drivers usually spend one and one-half hours a day, sometimes longer, in unloading freight cars and hauling the produce to defendant's place of business.

4. Defendant sells its produce to other wholesalers and to retail merchants in Louisiana and other States. Though the bulk of goods is sold to local merchants, substantial out-of-State sales amounting to approximately 5% of the total yearly sales are made to out-of-State customers. In the year 1939, out of total sales amounting to $201,829.00, the sales to out-of-State customers amounted to $11,450.00. In the year 1940, total sales aggregated $198,994.00, with out-of-State sales amounting to $15,885.00. In 1941 and 1942, total sales aggregate $245,084.00 and $448,758.00, respectively, while out-of-State sales for those years were $12,028.00 and $18,915.00.

5. Defendant's warehouse employees sort, select, repackage, and handle produce received without distinction as to its ultimate destination. Orders are made up from stock on hand, and an average of twelve a day are shipped to out-of-State customers. Usually a Railway Express Company truck comes by defendant's place of business each day, and the out-of-State orders are loaded thereon by the defendant's employees.

32

6. In the normal course of its business, defendant also sells substantial amounts of vegetables and produce to ship chandlers. Such sales occur every week. The ship chandlers purchase the produce to provision boats for oceangoing voyages, and usually in amounts sufficient to last until the boats reach their next port of call. The bulk of the produce purchased by ship chandlers is picked up by them in their own trucks at defendant's place of business. However, defendant's own truck drivers frequently deliver orders for boats docked in the New Orleans Harbor. Sometimes these orders are just unloaded at the docks, sometimes they are unloaded onto runners and onto winches and immediately pulled or hoisted aboard the boat. On rare occasions

the defendant's employees carry the produce on the boats themselves. The ship chandlers who purchase these produce do not specifically advise defendant of the destination and proposed use thereof.

7. Because of their perishable nature, there is a very rapid turnover of the produce and goods handled by defendant. In general, all goods received from out-of-State sources are unloaded, examined, sorted, repackaged, sold and delivered within one to five days after they are acquired by defendant. This rapidity of movement is exemplified by defendant's custom of using the refrigerated freight cars in which goods are received as a temporary night storage place for produce that may be on hand at the end of the day. The freight cars are always fully unloaded and released within two to five days after arrival.

8. During the period from October 24, 1938, to July, 1940,
33 defendant paid many of its employees rates less than the prevailing minima of 25¢ and 30¢ per hour specified by the Act. Defendant's books during this period show only the total weekly salaries paid to employees. The hours worked by warehousemen, carmen, and truckdrivers, ranging from 55 to 75 hours a week were far in excess of what their salaries would cover at the minimum rates prescribed by the Act.

After July 1940, defendant's records were changed and purported to show that employees received at least the minimum wage for all hours worked. However, I find that employees worked longer hours than were credited to them on defendant's books and as a consequence still were receiving less than the minimum wage prescribed.

9. From October 24, 1938, until July 1940, defendant paid no additional amounts for overtime compensation for hours in excess of 44 and 42 per week. Office and warehouse employees who were entitled to overtime compensation because of the long hours they worked during this period received none.

After July 1940, defendant's books purport to show overtime payments to some employees but since employees worked longer hours than they were credited with by defendant their compensation did not adequately cover the overtime work done by them at the overtime rate prescribed by the Act.

10. From October 24, 1938, until July 1940, defendant kept no daily or weekly records of the hours worked by its employees as required by the Administrator's Regulations.

After July 1940, defendant kept what purported to be time records for employees, but I find that employees were not actually credited with all hours which they worked.

34 11. As a result of several inspections made by the Wage and Hour Division during the period involved in this suit,

defendant was well aware of the provisions of the Fair Labor Standards Act. However, defendant has consistently contested the applicability of the Act to its employees and has taken the position in this suit that the coverage of the Act does not extend to a wholesaler operating its business in the manner in which the defendant operates.

Conclusions of law

1. The Court has jurisdiction of the parties hereto and of the subject matter of this action (29 U. S. C., Sec. 217).

2. Those employees of defendant who unloaded produce from freight cars coming from out-of-State sources; those who hauled such produce from the freight cars to defendant's place of business and there unloaded it;[1] those who prepared and shipped orders to out-of-State customers;[2] and those who prepared and delivered orders to ship chandlers for provisioning of vessels on their voyages[3] were intimately connected with and a part of commerce, as defined by Section 3 (b) of the Fair Labor Standards Act, and were engaged in commerce within the meaning of Sections 6 and 7 of said Act and entitled to the benefits thereof.

3. The employees of defendant who sorted, picked over, handled, packaged, and repackaged produce in defendant's place of business without regard to the final destination thereof, part of said goods being regularly shipped to out-of-State customers in the normal course of defendant's business, were producing goods for commerce within the meaning of Section 3 (j) of the Act and were entitled to the benefits of Sections 6 and 7 thereof.[4]

4. The fact that the ship chandlers to whom defendant sold produce did not specifically notify defendant that such produce was to be used for provisioning boats on their ocean-going voyages is not controlling. What is important is that defendant's employees spent a substantial portion of their time working on such goods which did move outside the State and defendant cannot escape the impact of the Act by a claim of ignorance where as here it had every reason to anticipate and expect that the goods would move from the State to a place outside thereof.[5]

5. Because of the rapidity in turnover of produce received from out-of-State sources due to their perishable nature and the defendant's method of handling them, there was a continuity of movement of such goods from out-of-State to defendant's customers, whether local or distant; and all employees of defendant were an

[1] Walling v Jacksonville Paper Co., — U. S. — (decided Jan. 18, 1943).
[2] Walling v. Goldblatt Bros. Inc., 128 F. (2d) 778; and see Fleming v. Enterprise Box Co., 125 F. (2d) 897, cert. den. 62 Sup. Ct. 1312; Hamlet Ice Co. v. Fleming, 127 F. (2d) 165, cert. den. 63 Sup. Ct. 29.
[3] Atlantic Company v. Walling, 131 F. (2d) 518.
[4] Fleming v. Kenton Looseleaf Tobacco Co., 41 F. Supp. 255.
[5] Warren-Bradshaw Drilling Co. v. Hall, — U. S. — (decided Nov. 9, 1942).

integral part of that movement and were engaged in commerce within the meaning of the Act.[6]

6. The Act applies generally to employees of an employer who handles goods without reference to their ultimate destination, some being selected for shipment interstate and some intrastate according to the daily demands of business.

Congress was not unaware that it would be practically impossible without disrupting the distribution business to restrict the application of the Act to those cases where a definite intention can be proved that particular pieces of goods, fruit, vegetables, or anything else shall move later on in interstate commerce.[7]

36 7. Employees of a wholesaler engaged in obtaining goods from points outside the State and distributing them to points in other States are engaged in the stream of interstate commerce and entitled to the benefits of the Fair Labor Standard Act.[8]

8. By paying its employees who were engaged in commerce and in the production of goods for commerce at rates less than the minima prescribed in the Act, defendant has violated Sections 6 and 15 (a) (2) of the Fair Labor Standards Act of 1938 (29 U. S. C. Secs. 206, 215 (a) (2)).

9. By paying its employees who were engaged in commerce and in the production of goods for commerce at rates less than one and one-half times the minimum rates prescribed by the Act, or less than one and one-half times their regular rate of pay, whichever was greater, for hours worked in excess of 44 hours per week from October 24, 1938, through October 23, 1939, and for hours worked in excess of 42 hours per week from October 24, 1939, to October 23, 1940, and for hours worked in excess of 40 hours per week thereafter, defendant has violated Sections 7 and 15 (a) (2) of the Fair Labor Standards Act of 1938 (29 U. S. C., Secs. 207, 215 (a) (2)).

10. By its failure to make, keep and preserve records setting forth the information required to be recorded by Regulations of the Administrator which became effective October 24, 1938, and amendments thereto; and, more particularly by its failure to record the hours worked each work day and each work week by each employee until July 1940, and by failing to credit employees for all hours worked thereafter, defendant violated the provisions of Secs. 11 (c) and 15 (a) (5) of the Fair Labor Standards Act of 1938 (29 U. S. C., Secs. 211 (c) and 215 (a) (5)).

37 11. By shipping to out-of-State customers goods produced by its employees who were receiving less than the minimum and overtime rates prescribed by the Fair Labor Stand-

[6] Walling v. Jacksonville Paper Co., Supra.
[7] United States v. F. W. Darby, 312 U. S. 100.
[8] Stafford v. Wallace, 258 U. S. 495.

ards Act, defendant violated Section 15 (a) (1) thereof (29 U. S. C. Sec. 215 (a) (1)).

12. Because of defendant's course of violations of the Act over a long period of time, and then mere semblance of compliance under official pressure of the Wage and Hour Division inspectors, coupled with defendant's present contention that the Act is not applicable to it; and upon the whole record, the plaintiff is entitled to the relief sought in the complaint herein.*

The plaintiff is entitled to injunction in accordance with the foregoing findings of fact and conclusions of law, and proper order and judgment providing therefor may be presented after notice.

New Orleans, Louisiana, March 31st, 1943.

(Signed) WAYNE G. BORAH,
U. S. District Judge.

In United States District Court

Judgment

Filed April 9th, 1943

The above styled cause came on regularly for trial before this Court sitting without a jury in New Orleans, Louisiana, on the 9th, 10th, and 11th days of February, 1943, plaintiff and defendant appearing by counsel; and trial having been had on issues
38 joined, the Court having heard and considered the oral testimony and documentary evidence adduced, and the cause having been submitted to the Court on the whole record therein and the arguments of counsel for the respective parties,

Now, therefore, sufficient reason therefor appearing and upon the Findings of Fact and Conclusions of Law made and filed herein on March 31, 1943, it is

Ordered, adjudged, and decreed, by the Court, that defendant, its agents, servants, employees and attorneys, and all persons acting or claiming to act in its behalf or interest, be and they are hereby permanently enjoined and restrained from violating the provisions of Sections 15 (a) (1), 15 (a) (2), and 15 (a) (5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, U. S. C. Title 29, Sec. 201, et seq.), hereinafter referred to as the Act in any of the following manners:

(1) The defendant shall not, contrary to Section 6 of the Act, pay any of its employees who are engaged in commerce and in the production of goods for commerce, as defined by the Act, from the date of this judgment to October 24, 1945, wages at rates less than

* Walling v. Jacksonville Paper Company, supra.

thirty (30) cents an hour except to the extent that a lower wage rate is authorized by an applicable order of the Administrator issued under Section 8 (e) of the Act. The defendant shall not at any time pay to its above described employees wages at rates less than those prescribed in any applicable order of the Administrator issued pursuant to the provisions of Section 8 of the Act. The provisions of this paragraph shall not prevent defendant from paying to any of its employees wages authorized as to such employees by a special certificate issued and in effect under Section 14 of the Act.

(2) The defendant shall not, contrary to Section 7 of the Act, employ any of its employees engaged in commerce,
39 and in the production of goods for commerce, as defined by the Act, for a workweek longer than forty (40) hours, unless the employee receives compensation for his employment in excess of forty (40) hours at a rate not less than one and one-half times the regular rate at which he is employed.

(3) The defendant shall not fail to make, keep, and preserve records of its employees, and of the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by the regulations of the Administrator issued, and from time to time amended, pursuant to Section 11 (c) of the Act, and found in Title 29, Chapter V, Code of Federal Regulations, part 516.

(4) The defendant shall not, contrary to Section 15 (a) (1) of the Act, ship, deliver, transport, offer for transportation, or sell in interstate commerce, defined by the Act, or ship, deliver, or sell with knowledge that shipment, delivery, or sale thereof in interstate commerce is intended, any goods in the production of which any employee of the defendant has been employed at rates of pay less than those specified in Paragraphs (1) and (2) of this judgment, and it is

Further Ordered, Adjudged, and Decreed, by the Court, that all costs and disbursements of this action shall be paid by defendant.

Dated April 9, 1943.

(Signed) WAYNE G. BORAH,
United States District Judge.

40 In United States District Court

Notice of appeal

Filed April 14th, 1943

Notice is hereby given that James V. Reuter, Inc., original defendant in the above numbered cause, and styled appellant herein,

hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit, from the decree entered herein on April 9th, 1943, enjoining appellant herein from violating Sections 15 (a) (1), 15 (a) (2) and 15 (a) (5) in the particulars therein stated and specified.

New Orleans, Louisiana, April 14th, 1943.

NORMANN & ROUCHELL and
CARLOS E. LAZARUS,
Attorneys for Appellant,

By (Sgd.) F. NORMANN,
A Member of the Firm.

1605 Hibernia Bank Building, New Orleans, Louisiana.

In United States District Court

Statement of points on which appellant intends to rely on appeal

Filed April 17th, 1943

Now into Court comes James V. Reuter, Inc., Appellant in the above styled and numbered cause, and as a basis for and in connection with this appeal, assigns the following points as error in the Decree of this Court enjoining said Appellant from
41 violating Sections 15 (a) (1), 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act (29 U. S. C. A. Secs. 201, et seq.) in the particulars therein specified:

1. Error was committed in holding that Appellant and its employees are engaged "in commerce" within the definition of the Fair Labor Standards Act.

2. Error was committed in holding that Appellant and its employees are engaged in the "production of goods for commerce" within the definition of the Fair Labor Standards Act.

3. Error was committed in holding that Appellant's employees are entitled to the benefits of the Fair Labor Standards Act.

4. Error was committed in granting the injunction, in absence of any evidence showing violations for more than one year prior to trial.

Wherefore, appellant prays that the Decree herein rendered by this Court on April 9th, 1943, be reversed for the reasons herein assigned.

New Orleans, Louisiana, April 16th, 1943.

NORMANN & ROUCHELL and
CARLOS E. LAZARUS,
Attorneys for Appellant.

By (Sgd.) F. NORMANN,
A Member of the Firm.

1605 Hibernia Bank Building, New Orleans, Louisiana.

42 In United States District Court

Amended praecipe

Filed April 29th, 1943

Honorable A. DALLAM O'BRIEN, Jr.,
Clerk, United States District Court,
Eastern District of Louisiana, New Orleans, Louisiana.

DEAR MR. O'BRIEN: Please prepare the record on Appeal to the United States Circuit Court of Appeals for the Fifth Circuit in the above captioned cause in accordance with this amended praecipe and include in the said record the following:

(1) Bill of Complaint.
(2) Motion to dismiss claim, or in the alternative for a bill of particulars.
(3) Ruling on motion dated February 25th, 1942.
(4) Bill of particulars.
(5) Motion to strike.
(6) Ruling on motion to strike dated March 25th, 1942.
(7) Order for substitution of party-plaintiff.
(8) Answer.
(9) Findings of fact, conclusions of law and judgment.
(10) Notice of Appeal.
43 (11) Designation of points on which appellant intends to rely on appeal.
(12) This praecipe.

Dated at New Orleans, Louisiana, this 29th day of April 1943.

NORMANN & ROUCHELL,
By F. NORMANN,
A Member of the Firm,
Attorneys for James V. Reuter, Inc.

1605 Hibernia Bank Building, New Orleans, Louisiana.

44 [Clerk's certificate to foregoing transcript omitted in printing.]

45 [Supersedes bond on appeal for $5,000 approved and filed April 15, 1943, omitted in printing.]

47 In United States Circuit Court of Appeals,
Fifth Circuit

No. 10637

JAMES V. REUTER, INCORPORATED

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

Argument and submission

May 31, 1943

On this day this cause was called, and, after argument by Frank S. Normann, Esq., for appellant, and James H. Hynes, Esq., Acting Regional Attorney, United States Department of Labor, for appellee, was submitted to the Court.

48 In the United States Circuit Court of Appeals for the Fifth Circuit

No. 10637

JAMES V. REUTER, INCORPORATED, APPELLANT

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, APPELLEE

Appeal from the District Court of the United States
for the Eastern District of Louisiana

Before HUTCHESON, HOLMES, and WALLER, Circuit Judges

Opinion

Filed July 22, 1943

WALLER, Circuit Judge: Appellant appeals from an injunction of the District Court restraining it from violating certain provisions of the Fair Labor Standards Act (29 U. S. C., Sec. 201, et seq.). The lower Court found that defendant was engaged
49 in purchasing, receiving, handling, selling, and distributing at wholesale fresh fruits, vegetables, and similar produce. Approximately fifty percent of the produce handled by appellant was purchased from outside the State of Louisiana and shipped to

the defendant by rail in refrigerated cars. The cars are delivered by the railroad company to the switch of the defendant, approximately one block from appellant's place of business, and the produce is ultimately unloaded by some of defendant's employees and trucked to the defendant's store where the produce is sorted, selected, prepared, and repackaged for sale. Approximately ninety-five percent of the defendant's sales are local and the other five per cent of the defendant's yearly sales are to customers in states other than Louisiana. Appellant's truck drivers also make delivery of produce to vessels in the harbor of New Orleans for the subsistence of the crews of such vessels, usually in amount sufficient to last until the next port is reached. The commodities handled by the appellant are perishable, the very nature of which requires rapid sale and disposition, and in the course of business are unloaded, examined, sorted, repackaged, sold, and delivered within one to five days. There is no dispute over the findings of fact by the lower Court.

The defendant claimed that it was not within the provisions of the Fair Labor Standards Act and, therefore, not required to comply with its provisions.

The Court below made a very broad injunctive order after reaching the following legal conclusions:

1. That the employees who unloaded produce from freight cars coming from out of the state; those who hauled produce from freight cars to defendant's place of business and unloaded it; those who prepared and shipped orders to out-of-state customers; those who prepared and delivered orders to local ship chandlers for provisioning of vessels on their voyages, were engaged in commerce within the meaning of Sections 206 and 207, 29 U. S. C.

2. That the employees of the defendant who sorted, picked over, handled, packaged, and repackaged produce in the defendant's place of business without regard to the final destination thereof, were producing goods for commerce within the meaning of the Act.

3. That those employees engaged in delivering goods to vessels were engaged in commerce within the meaning of the Act since the defendant had every reason to expect that the goods would move from the state to a place outside thereof.

4. Because of the rapidity in turnover of produce received from out of the state, due to the perishable nature and the defendant's method of handling same, there was a continuity of movement of such goods from out of the state to defendant's customers, whether local or distant, and that all employees of the defendant were a part of the movement and engaged in commerce within the meaning of the Act.

5. That the Act applies generally to employees who handle goods without reference to their ultimate destination, whether intrastate or interstate, according to the daily demands of the business.

6. That employees of a wholesaler engaged in obtaining goods from points outside of the state and delivering them to points in other states are engaged in commerce and entitled to the benefits of the Act.

7. That defendant, by paying its employees who were engaged in commerce and production of goods for commerce at rates
51 less than the minima prescribed by the Act, has violated Sections 206 and 215 (a) (2) of 29 U. S. C.

8. That by paying its employees less than time and one-half for overtime during the period involved, defendant has violated Sections 207 and 215 (a) (2) of 29 U. S. C.

9. By failing to make, keep, and preserve records setting forth information required by the regulations of the Administrator, and more particularly by failing to record the hours worked each day and each week by each employee, and by failing to credit employees for all hours worked, the defendant violated Sections 211 (c) and 215 (a) (5) of 29 U. S. C.

10. That by shipping to out-of-state customers goods produced by employees not paid according to the wage requirements of the Act, the defendant violated Section 215 (a) of 29 U. S. C.

An injunction in conformity with the foregoing conclusions was entered.

We are unable to agree with all of the legal conclusions of the lower Court. We do, however, agree that truck drivers and their helpers when engaged in unloading produce from freight cars coming from out of the State and when engaged for a substantial part of their time in hauling such produce from freight cars to defendant's place of business are within the coverage of Sec. 6 (Title 29, Sec. 206), or the minimum wage provision of the Act, but we hold that truck drivers are not subject to the overtime provisions of the Act. (See Southland Gasoline Company vs.
52 Bayley, — U. S. —, decided May 3, 1943; Walling, Administrator, vs. Silver Brothers Co. (First Cir.), — Fed. (2) —, decided May 21, 1943.)[1]

We further hold that employees, when engaged for a substantial part of their time in: (a) preparing, selling, shipping, or deliver-

[1] Sec. 13 (b) (Sec. 213 (b), Title 29, U. S. C.), provides:
"The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act."
Sec. 304 (a) (3), Title 49, provides that it shall be the duty of the Interstate Commerce Commission—
"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end

ing for shipment, orders to out-of-state customers; (b) buying, ordering, paying for, keeping records on, goods purchased from out of the State, are within the coverage of both the minimum wage (Sec. 6) and overtime (Sec. 7) provisions of the Act
53 and should be paid not less than the minimum, with time and one-half for overtime, for each hour so engaged.[2] We also agree that the defendant should be required to keep accurate and adequate records as required by the Act and regulations promulgated thereunder.

We disagree with the legal conclusion of the lower Court that the defendant's employees were engaged in the production of goods for commerce, as held in Paragraph 3 of the conclusions of the Court below, hereinabove stated as Paragraph 2.

We disagree with the legal conclusions of Paragraph 4 of the Conclusions of the Court below, hereinabove stated as Paragraph 3, that the employees when packing, hauling, and delivering goods to vessels in the port of New Orleans for the provisioning of the crew were within the provisions of the Act, for the reason that the commodities so delivered were to be consumed by the crew of the vessel and were not to be either shipped, sold, or delivered in interstate commerce, but were delivered to the ultimate consumer, and, under Paragraph (1) of Section 203, Title 29, U. S. C.,[3] defining the meaning of "goods" covered by the Act, the food for the crews would be excluded. The vessel was not a producer, manufacturer, or processor, but was the ultimate consumer into whose hands the "actual physical possession" of the goods was delivered. It matters not, therefore, whether some portion of these goods survived until the vessels reached foreign waters or

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prescribe qualifications and maximum hours of service of employees, and standards of equipment * * *."

The Supreme Court, in Southland Gasoline Co. vs. Bayley, supra, in construing the above statutes as they relate to employees of private carriers (such as is defendant here), said:

"* * * Section 13 (b) (1) exempts from the maximum hour limitation of the Fair Labor Standards Act those employees over whom the Interstate Commerce Commission 'has power to' prescribe maximum hours of service. Section 204 (a) (3)* certainly gives 'power to' the Commission to establish maximum hours for the employees here involved. There is a limitation on the authority delegated, urged here by the employees as a condition precedent to the existence of the power. This is that the Commission may establish maximum hours only 'if need therefore is found.' Since the employees seek unpaid overtime compensation only for the period prior to a finding of need by the Commission, the employees argue that no 'power' existed in the Commission during the time for which compensation is claimed. We conclude to the contrary. The power to fix maximum hours has existed in the Commission since the enactment of the Motor Carrier Act in 1935. Before that power could be used, it was necessary to make a finding of need. Such necessity, however, did not affect the existence of the power. Legislation frequently delegates power subject to a finding of need or necessity for its exercise."

* Sec. 304 (a) (3), Title 49, U. S. C.

* * * * * *

"Not only does the language of section 13 (b) (1) indicate this Congressional purpose but what slight evidence there is from the legislative history points to the same conclusion. The amendment was adopted to free operators of motor vehicles from the regulation by two agencies of the hours of drivers."

[2] Walling vs. Jacksonville Paper Co., 128 Fed. (2) 395; 317 U. S. 561

[3] "Provided that the term 'goods' does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof, other than a producer, manufacturer, or processor thereof."

whether the goods were consumed by the crew in port, because Congress was undertaking to regulate only goods which were intended for resale or for processing or for manufacturing into other products.

54 This situation in reference to goods delivered to the ultimate consumer is entirely unlike the delivery of ice to refrigerating cars to accompany and preserve perishable products moving in interstate commerce as in Hamlet Ice Co. vs. Fleming, 127 Fed. (2) 165, and Atlantic Co. vs. Fleming, 129 Fed. (2) 87. The ice in each of those cases was an essential part of the process of shipping the fruit or vegetables. It accompanied the produce along its interstate journey. The ice companies sold same with knowledge that it was to be shipped in interstate commerce, as a *sine qua non* to interstate vegetable shipments. In Enterprise Box Co. vs. Fleming, 125 Fed. (2) 897, the federal regulations required cigars to be shipped in a container, which likewise accompanied the cigars in their interstate journey, and the cigar-box manufacturer knew that shipment and delivery in interstate commerce was not only intended but required.

But food for the crew of a vessel might be consumed in port. A member of the crew could eat and get shore leave, or desert the ship. He could subsist on food other than that sold by defendant. The food does not necessarily accompany the cargo, albeit the crew must eat on the voyage, but so must a flagman or conductor on an interstate train, yet it would hardly be seriously contended that the restauranteur who served the flagman a lunch en route, or the wife or boarding house keeper who prepared a lunch for him to take on his run, was engaged in interstate commerce.

Congress did not exercise the full extent of its power in dealing with the subject, but expressly excluded goods delivered to the ultimate consumer, other than a producer, manufacturer, or processor. The vessel was not a producer or manufacturer, and it is not believed that the term "processor" included the digestive processes of the crew.

55 Sec. 215 (a) (1) makes it unlawful "to transport, offer for transportation, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods" produced in violation of the Act. "Goods" after delivery to ultimate consumer are excluded, and hence not "in commerce." It, therefore, is not unlawful to ship, sell, or deliver goods to the ultimate consumer which are not intended for reselling or manufacturing or processing.

Nor do we agree with the legal conclusion of the lower Court that perishable fruits and vegetables may not come to rest merely

because they cannot be kept indefinitely. The lower Court found that:

"Because of their perishable nature, there is a very rapid turnover of the produce and goods handled by defendant. In general, goods received from out-of-state sources are unloaded, examined, sorted, repackaged, sold and delivered within one to five days after they are acquired by defendant."

They may not come to rest as long as an axe handle might on the shelf of a hardware merchant, but goods sold by the defendant locally have certainly come to the end of their interstate journey and have been placed in the store of the merchant along with goods locally acquired, and are, therefore, subject to the jurisdiction of the State. The term "coming to rest" must be considered in its relation to the commodity. The rest period of an axe handle could be far greater than the rest period of a tomato, and the perishable nature of the commodity alone would not place the vegetable merchant under the Act when the hardware merchant is not, merely because the axe handle could endure a longer period of repose than a tomato. Vegetables do not have to "come to rot" in order to "come to rest."

56 It is a matter of common knowledge that perishable fruits and vegetables cannot be "uncrated and examined," or "examined, sorted, repackaged, sold, and delivered" (quoting the language of the lower Court) on the run. The spoiled and rotten must be culled out. Buyers must be found willing to buy, and pay for, produce of the quality and price offered: That sold must be segregated and selected to fill the order. The produce must often be repackaged or crated and thereafter delivery must be made. These miscellaneous tasks are time consuming and are inconsistent with continuity of movement.

We do not hold, however, that commodities left unloaded in the refrigerated car and not placed in the store or warehouse have come to rest. Until and unless the goods are unloaded from the freight car and placed in the store or warehouse the interstate movement will not have ended.[4]

It appears that only five percent of the sales of the appellant are to interstate customers. It also appears that the appellant has ten to fifteen employees performing intra-and inter-state functions. If the functions in connection with sales of commodities to out-of-state customers were equally divided between ten employees then the interstate activity of each employee would touch only one-half of one percent of the business of appellant. If the five percent interstate business were equally handled by the fifteen employees, then the interstate activity of each employee

[4] Texas Company vs. Brown, 258 U. S. 477.

would affect only one-third of one percent of the business, as measured in money, and since the Court is not concerned with trifles its injunctive processes would hardly be called forth unless some of the employees have been engaged for a substantial portion of their time in these interstate activities.

Since manifestly some of the employees are engaged in interstate commerce the defendant should be required
57 to keep adequate records as to all of its employees as required by the Act and regulations promulgated thereunder.

The lower Court apparently determined that all of the employees of the defendant were covered under the Act, or, if it did not consider that all of defendant's employees were within the Act the injunctive order did not specify what employees, if any, were not covered. The Court below, by the width and indefiniteness of its injunction, committed an error similar to the one committed by the writer as District Judge in Fleming vs. Jacksonville Paper Company, 128 Fed. (2) 395.

The cause should be, and the same is hereby, reversed and remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

Dissenting opinion

HOLMES, Circuit Judge, dissenting:

The issues were heard by the court below on oral and documentary evidence. The court made its findings of fact and announced its conclusions of law; and, since the evidence was not brought up on appeal, it is on those findings and conclusions that the judgment appealed from must stand or fall.

The opinion says that the majority does not "agree with the legal conclusion of the lower court that perishable fruits and vegetables may not come to rest merely because they cannot be kept indefinitely." With deference, the district court did not so hold. It found as a fact that such was the rapidity of movement and the method of handling of goods purchased from outside the state that each such transaction was a continuous and unbroken shipment in
58 interstate commerce from without the state through appellant into the hands of its customers. Upon this finding of fact, the court held as a matter of law that all of appellant's employees were an integral part of that interstate movement and were therefore engaged in commerce under the Act. This ruling is not erroneous as a matter of law, and there is nothing in the record to show that it is untrue as a matter of fact.

The burden is on the appellant to show error in the judgment that it is asking this court to set aside. It has not met this

burden. We should apply here the reasoning of Higgins v. Carr Bros., 317 U. S. 572, in which there was a failure "to show an actual or practical continuity of movement of merchandise from without the state to respondents' regular customers within the state"; and wherein the Supreme Court held that there was nothing in the record to impeach the accuracy of the conclusion of the court below, saying: "Thus petitioner has not maintained the burden of showing error in the judgment which he asks us to set aside."

Since appellant has failed to show that this particular finding was clearly erroneous, and since by it every employee of appellant was brought within the coverage of the Act, I think the judgment appealed from should be affirmed.

59 In United States Circuit Court of Appeals

No. 10637

JAMES V. REUTER, INCORPORATED,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

Judgment

July 22, 1943

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

HOLMES, Circuit Judge, dissents.

60 [Clerk's certificate to foregoing transcript omitted in printing.]

61 Supreme Court of the United States

No. 436, October Term, 1943

[Title omitted.]

Order allowing certiorari

Filed November 22, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[File endorsement on cover:] File No. 47,929. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 436. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner *vs.* James V. Reuter, Inc. Petition for a writ of certiorari and exhibit thereto. Filed October 18, 1943. Term No. 436 O. T. 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943